(19)

HIGH COURT OF CHHATTISGARH, BILASPUR

CRIMINAL APPEAL No. 1414 of 2000

Manoj Kumar Yadav

Vs.

State of Madhya Pradesh (Now Chhattisgarh)

JUDGMENT

Post for: 02.07.2007

Sd/-
SUNIL KUMAR SINHA
Judge

(20)

HIGH COURT OF CHHATTISGARH, BILASPUR

CRIMINAL APPEAL No. 1414 of 2000

APPELLANT Manoj Kumar Yadav, S/o Ishwari Yadav, Aged about 18 years, R/o Village Ghumka, District Rajnandgaon

Versus

RESPONDENT State of Madhya Pradesh (Now Chhattisgarh) through : Police Station Ghumka, District- Rajnandgaon (C.G.)

(Appeal under Section 374 of Cr.P.C.)

Appearance:

Ms. Nirupama Bajpai, counsel for the appellant.

Shri Sushil Dubey, Govt. Advocate, for the State.

JUDGMENT
(02.07.2007)

SUNIL KUMAR SINHA, J.

(1) Being aggrieved with the judgment of conviction and order of sentence dated 15.4.2000, passed by the IInd Additional Sessions Judge, Rajnandgaon (C.G) in Sessions Trial No.10/2000, whereby the said Court convicted the appellant under Section 376 (2) (f) I.P.C. and sentenced him to undergo R.I. for 10 years and to pay a fine of Rs.2,000/-, in default of payment of fine to further undergo R.I. for 1 year, the appellant has preferred this criminal appeal.

(2) The brief facts are that the prosecutrix/victim- Sukhmani, aged about 6-7 years, was playing near her house in village- Ghumka at about 4.00 p.m. 4.11.99. The appellant, who is a neighbour, came over there and took her to the *Khotha* (place of keeping cattles) of one Chetan Lodhi and after laying down her on the ground and removing her clothes, tried to penetrate his penis into her vagina by using force. When the girl started crying, she was stopped by him and when the discharge took

place, he ran away from the place of occurrence. The girl narrated the story immediately to Kanta Lodhi and Bahal Verma and when her parents came at about 5.00 p.m., she also narrated the story to them. The report was lodged on 8.11.99.

(3) During the course of investigation, the girl was sent for medical examination and was examined by Dr. (Smt.) Shel Khare (P.W.-11), who prepared her report Ex.-P/15. According to her, there were no external injuries on the person of the victim. On local examination her labia majora and labia minora were found intact. There was reddishness at the inner aspect of labia minora. However, the hymen was intact. According to her opinion, an attempt might have been made for commission of rape. The appellant was also sent for medical examination and was examined by Dr. Mithilesh Choudhary (P.W.-5), who gave his report Ex.-P/4. According to him there were no signs which may suggest that the boy was impotent i.e. he was capable of performing sexual intercourse.

(4) The conviction of the appellant is based upon the evidence of the prosecutrix (P.W.-2) and her father Ramchandra (P.W.-1) as also the evidence of lady Doctor (Smt.) Shel Khare (P.W.-11) and the Head Mistress of the school Smt. Saroj Mikka (P.W.-10), who has proved the date of birth of the victim as 15.10.93 as per entry Ex.-P/14.

(5) Learned counsel for the appellant has not disputed the age of the prosecutrix. Moreover, her date of birth has been established by P.W.-10 Smt. Saroj Mikka, who has proved the entry of school register Ex.P/14, the copy of which has been retained as Ex.-P/14 C. Not only this, the father of the prosecutrix namely Ramchandra (P.W.-1) has also stated in Para-1 of his examination that the prosecutrix was aged about 7 years on the date of his examination, which took place on 1.3.2000. Therefore, it was established that the prosecutrix/victim was aged about 6-7 years on the date of incident.

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(6) So far as commission of sexual intercourse is concerned, learned counsel for the appellant argued that since the hymen of the girl was intact and there is no evidence of penetration, therefore, the performance of forceful intercourse has not been proved and the conviction of the appellant vitiates.

(7) So far as question of hymen being intact is concerned, in case of a girl of tender age, rupture of hymen, in the event of penetration, is not as a matter of rule. In cases where the hymen is deep seated, it may not rupture though there may be a penetration. In case of a forcible attempt to penetrate also, there are chances that the hymen of the victim may not rupture particularly when it is deep seated. The presence of redness and inflammation over the vagina is at least a sign that either a complete penetration has taken place or a partial penetration has taken place or a forcible attempt to penetrate was made against the victim. Modi opines in his Medical Jurisprudence that in small children, the hymen is not usually ruptured, but may become red and congested along with the inflammation and bruising of the labia. If considerable violence is used, there is often laceration of the fourchette and the perineum. Please see **Modi's Medical Jurisprudence and Toxicology, 23rd Edn., page 928**.

(8) In the case of **Aman Kumar and another vs. State of Haryana** reported in **2004 Cr.L.R. (SC) 207** it has been observed by the Apex Court in para 7 that

> "The rupture of hymen is by no means necessary to constitute the offence of rape. Even a slight penetration in the vulva is sufficient to constitute the offence of rape and rupture of hymen is not necessary. Vulva penetration with or without violence is as much rape as vaginal penetration. The statute merely requires evidence of penetration, and this may occur with the hymen remaining intact. The *actus reus* is complete with penetration. It is well settled that the prosecutrix cannot be considered as

accomplice and, therefore, her testimony cannot be equated with that of an accomplice in an offence of rape. In examination of genital organs, state of hymen offers the most reliable clue. While examining the hymen, certain anatomical characteristics should be remembered before assigning any significance to the findings. The shape and the texture of the hymen is variable. This variation, sometimes permits penetration without injury. This is possible because of the peculiar shape of the orifice or increased elasticity. On the other hand, sometimes the hymen may be more firm, less elastic and gets stretched and lacerated earlier. Thus a relatively less forceful penetration may not give rise to injuries ordinarily possible with a forceful attempt. The anatomical feature with regard to hymen which merits consideration is its anatomical situation. Next to hymen in positive importance, but more than that in frequency, or the injuries on labia majora. These, viz. labia majora are the first to be encountered by the male organ. They are subjected to blunt forceful blows, depending on the vigour and force used by the accused and counteracted by the victim. Further, examination of the females for marks of injuries elsewhere on the body forms a very important piece of evidence. To constitute the offence of rape, it is not necessary that there should be complete penetration of the penis with emission of semen and rupture of hymen. Parietal penetration within the labia majora of the vulva or pudendum with or without emission of semen is sufficient to constitute the offence of rape as defined in the law. The depth of penetration is immaterial in an offence punishable u/s. 376 IPC."

(9) In the matter of **Tarkeshwar Sahu vs. State of Bihar (now Jharkhand)** reported in **(2006) 8 SCC 560**, the Apex Court held vide para 10 that under Section 375 of the I.P.C., six categories indicated therein are the basic ingredients of the offence. The Supreme Court observed that in the facts and circumstances of the said case, where the prosecutrix was 12 years of age, her consent was irrelevant. The appellant had

forcibly taken her to his Gumti with the intention of committing sexual intercourse with her. The important ingredient of the offence under Section 375 punishable under Section 376 of the I.P.C. is penetration which is altogether missing in the said case, the Apex Court said that no offence under Section 376 of the I.P.C. can be made out unless there was penetration to some extent. In the absence of penetration to any extent, it would not bring the offence of the appellant within the four corners of Section 375 of the I.P.C. Therefore, the basic ingredients for proving a charge of rape are the accomplishment of the act with force. The other important ingredient is penetration of the male organ within the labia majora or the vulva or pudenda with or without any emission of semen or even an attempt at penetration into the private part of the victim completely, partially or slightly would be enough for the purpose of Section 375 and 376 of the I.P.C. The Apex Court held in para 13 that

> "In order to constitute rape, what Section 375 IPC requires is medical evidence of penetration and this may occur and the hymen remain intact. In view of the Explanation to Section 375, mere penetration of penis in vagina is an offence of rape. Slightest penetration is sufficient for conviction under Section 376 IPC."

(10) In the present case, the victim has deposed about attempted to perform sexual intercourse by making gesture, particularly by pointing towards her vagina. She has stated that the appellant had removed his own clothes including his underwear and he had also removed her underwear and thereafter, he laid down over her and did like that due to which, she felt pains in her vagina. Though she has not clearly stated about the penetration by using penis but over all evidence of the witnesses would show that the appellant had attempted to commit complete penetration against her. The version of the prosecutrix is supported by the evidence of lady Dr. (Smt.) Shel Khare (P.W.-11), who had noticed reddishness on the inner

aspect of labia minora which suggests that during the course of attempt to commit complete penetration, a slightest penetration has taken place, which has caused injury to the inner aspect of labia minora, due to which, the victim sustained pains at the time of the said penetration and in the facts and circumstances of the case, in the opinion of this Court, the said act of the appellant would be classified as commission of rape as defined under Section 375 IPC.

(11) Since the victim was aged about 6-7 years on the date of incident, that means she was under 12 years of age, the Sessions Court has rightly held him guilty of offence punishable under Section 376 (2) (f) IPC.

(12) There appears to be no infirmity in the judgment of conviction and order of sentence passed by the Sessions Court. The appeal is devoid of merits and the same is accordingly dismissed.

Sd/-
SUNIL KUMAR SINHA
Judge

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